

**Asplundh Construction Corporation and Local 1049, International Brotherhood of Electrical Workers, AFL-CIO and Local 282, International Brotherhood of Teamsters, AFL-CIO.**  
Case 29-CD-452

August 25, 1995

**DECISION AND DETERMINATION OF  
DISPUTE**

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND BROWNING

The charge in this Section 10(k) proceeding was filed on May 10, 1995, by Asplundh Construction Corporation (Asplundh or the Employer), alleging that the Respondent, Local 1049, International Brotherhood of Electrical Workers, AFL-CIO (Local 1049), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Local 282, International Brotherhood of Teamsters, AFL-CIO (Local 282). The hearing was held on May 25, 1995, before Hearing Officer Kathy Drew King.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.<sup>1</sup>

**I. JURISDICTION**

Asplundh Construction Corporation is a New York corporation with its principal place of business in Patchogue, New York. Asplundh is a contractor engaged in the installation and repair of electric utility and natural gas lines, and also performs road construction work. During the 12 months preceding the hearing, Asplundh purchased and received at its Patchogue facility goods and materials valued in excess of \$50,000, from points located outside the State of New York. The parties stipulate, and we find, that Asplundh is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 1049 and Local 282 are labor organizations within the meaning of Section 2(5) of the Act.

**II. THE DISPUTE**

*A. Background and Facts of Dispute*

Asplundh's primary client in its gas line service operations is Long Island Lighting Company (LILCO). In servicing LILCO's gas lines, Asplundh performs three

primary functions: (1) it repairs leaks in natural gas mains up to 2 inches in diameter and in residential distribution service lines; (2) it retubes residential distribution service lines (i.e., replaces worn gas lines with smaller plastic lines threaded through the existing lines); and (3) it installs new natural gas mains up to 2 inches in diameter and installs new residential distribution service lines branching off the main to the residence or other service point.

When Asplundh purchased the construction contracting business from B & J Maintenance in or about 1990, it voluntarily recognized both Local 1049 and Local 282 and assumed its predecessor's collective-bargaining relationships with those Unions. Asplundh's employees represented by Local 1049 perform all the gas utility work described above pursuant to the parties' collective-bargaining agreement (the Gas Agreement). Employees represented by Local 282, on the other hand, are involved in Asplundh's road construction work. Pursuant to a collective-bargaining agreement between Local 282 and the Nassau-Suffolk Contractors Association (the Association), a multiemployer bargaining unit of which Asplundh is a member, employees represented by Local 282 drive trucks used in Asplundh's road construction work. The labor agreement between Local 282 and the Association is known as the Heavy Construction and Excavation Agreement, and governs those employees known as chauffeurs, on-site stewards and Euclid and Turnapull operators.

The performance of Asplundh's natural gas line work for LILCO involves the use of a variety of trucks, including pickup trucks, rack trucks, flatbed trucks, box trucks, and dump trucks, which may or may not pull a trailer containing hot asphalt called a "hot box." Before driving any one of these trucks, a driver must have a commercial driver's license and undergo specialized training in its operation. The trucks involved with Asplundh's gas line service work are used to transport personnel, tools, equipment, and materials to the jobsite, and typically remain at the jobsite with the crew until the shift is complete at the end of the day. Over the course of their collective-bargaining relationship with the Employer, only employees represented by Local 1049 have driven these trucks to and from their worksites.

The truck driving associated with Asplundh's heavy construction and excavation work is of a somewhat different nature. In a typical road construction job, Asplundh employees represented by Local 282 drive dump trucks to and from the jobsite in a continuous "round-robin" fashion, hauling away tons of debris for dumping and then bringing in loads of asphalt to the construction site. Under this regimen, the employees represented by Local 282 drive trucks to and from the jobsite for the duration of their shifts so that debris is continuously removed and asphalt is continuously

<sup>1</sup> We hereby grant Asplundh Construction Corporation's unopposed motion to correct the hearing transcript.

supplied. Although employees represented by Local 282 drive the trucks associated with Asplundh's heavy construction and excavation work, those employees have never driven the trucks involved with the Employer's gas line service work.

In January 1995, Asplundh began receiving a number of grievances from Local 282 claiming that the truck driving associated with certain of the Employer's gas line service work should be assigned to employees represented by Local 282 pursuant to the Heavy Construction and Excavation Agreement. The grievances were processed without resolution pursuant to steps established in the parties' collective-bargaining agreement, and now await arbitration.

At the same time the Employer was receiving Local 282's grievances, it was beginning negotiations with Local 1049 for renewal of the Gas Agreement. During the course of the negotiations, Thomas Draghi, Asplundh's manager of Gas Operations and its labor relations representative, notified Local 1049 Representative Everett Lewis that the Employer was receiving the truck driving grievances from Local 282. Lewis asked to be kept apprised of their status. In late April 1995, Draghi informed Lewis that Local 282's grievances were set for hearing before the parties' Joint Disputes Panel on May 10, 1995.

By letter dated May 2, 1995, Lewis informed Draghi that should Asplundh reassign the truck driving associated with certain gas line service work to employees represented by Local 282, the Employer would be in breach of the Gas Agreement, and the jobs and the work performance of the employees represented by Local 1049 would be "in jeopardy." Perceiving the letter as a veiled threat to stop the gas line service work, Draghi telephoned Lewis shortly after receiving the letter and requested a clarification of its intent. Lewis then informed Draghi that if the truck driving associated with certain gas line service work was assigned to employees represented by Local 282, employees represented by Local 1049 would stop performing the gas work altogether.

#### *B. The Work in Dispute*

The disputed work involves truck driving related to work on natural gas lines that are 2 inches or less in diameter, to excavation, including asphalt patch work, and to restoration work (pipe trench creation and filling), for the Long Island Lighting Company, as performed by employees of Asplundh Construction Corporation, which is located at Patchogue, New York.

#### *C. Contentions of the Parties*

Asplundh contends that Local 1049's threat to engage in a work stoppage is sufficient basis for the Board to have reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated, and neither

Union disputes this contention. With regard to the merits, Asplundh and Local 1049 assert that the work in dispute should be awarded to employees represented by Local 1049 based on past practice of the parties, the superior training and skills of the employees represented by Local 1049, governing provisions of the Gas Agreement, area and industry practice, and economy and efficiency of operations.

Local 282 asserts that Asplundh has not consistently assigned the disputed work to employees represented by Local 1049. Rather, as its grievance forms reflect, Local 282 asserts that its representatives have witnessed non-Local 1049 employees performing the disputed work on a number of occasions. In addition, Local 282 argues that at least one other gas line service contractor in the area utilizes employees represented by Local 282 to drive trucks incident to their gas line service work. Finally, Local 282 contends that the Gas Agreement is inapplicable to the disputed work and that its Heavy Construction and Excavation Agreement controls the issue. For these reasons, Local 282 asserts that the disputed work should be assigned to Asplundh employees it represents.

#### *D. Applicability of the Statute*

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, two jurisdictional prerequisites must be met. First, the Board must find reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. Second, the Board must find that the parties have failed to agree on a method for voluntary adjustment of the dispute.

These jurisdictional prerequisites have been met in this case. First, as noted above, both Local 1049 and Local 282 claim the work in dispute. In addition, Local 1049 Representative Everett Lewis has advised Asplundh both orally and in writing that if the Employer reassigns the work to employees represented by Local 282, employees represented by Local 1049 will cease performing gas line service work altogether. On this basis, we find reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. Second, the parties stipulated that they have not agreed on a method to adjust this dispute voluntarily. Accordingly, we find that the Board has jurisdiction to resolve this dispute.

#### *E. Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.*

*A. Jones Construction*), 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

### 1. Certification and collective-bargaining agreements

Both Unions involved in this dispute were voluntarily recognized by the Employer. Accordingly, neither Union has been certified by the Board.

As noted above, Asplundh and its employees represented by Local 1049 have entered into a collective-bargaining agreement known as the Gas Agreement. Section 1.01 of the Gas Agreement recognizes Local 1049 as the exclusive bargaining representative for Asplundh's employees engaged in gas utility work, including all work associated with gas lines 2 inches or less in diameter. Section 12.03 of the Gas Agreement explicitly states that "Employees will drive and operate company vehicles and equipment to perform work outlined in this Agreement." Finally, Sections 8.04 and 8.11 of the Gas Agreement indicate that certain employees must have a commercial driver's license to perform particular tasks delineated in the agreement, language which at least contemplates that driving the Employer's vehicles will be a component of the gas line service work.

Section 1(b) of the Heavy Construction and Excavation Agreement, Local 282's labor agreement with the Employer, governs work defined as "the Construction of Engineering Structures and Building Foundations, exclusive of the Erection of Building Superstructures." Section 20 of the agreement states that "Equipment historically manned by Employees covered by this Agreement and work historically performed by such equipment will continue to be manned and performed by Employees covered by this Agreement." Subsection (k) of section 6 of the agreement, which establishes rules governing the Employer's equipment, defines "trucks and equipment" to include "trucks, trailers, euclids, turnapulls and other equipment within the jurisdiction of Local 282."

We conclude that an analysis of the parties' collective-bargaining agreements favors an award of the disputed work to employees represented by Local 1049. The Gas Agreement explicitly refers both to the type of gas line service work involved in this case and the truck driving incident thereto, while the Heavy Construction and Excavation Agreement makes no mention of gas utility work at all.<sup>2</sup> In addition, the record does

not reflect that the equipment enumerated in the Heavy Construction and Excavation Agreement as that operated by employees represented by Local 282—trucks, trailers, euclids, turnapulls, and other equipment—is, in fact, equipment used to perform the truck driving at issue in this case. Rather, Asplundh Manager of Gas Operations Draghi testified that the equipment used to perform the disputed truck driving includes rack trucks, flat bed trucks, pickup trucks, dump trucks, and box trucks. We find that this factor favors an award of the disputed work to employees represented by Local 1049.

### 2. Employer preference and past practice

Thomas Draghi, Asplundh's manager of Gas Operations and its labor relations representative, testified that the Employer prefers to assign the disputed work to its employees represented by Local 1049. Moreover, it is undisputed that employees represented by Local 282 have never performed the disputed work before, either for Asplundh or for its two corporate predecessors.

Local 282 contends that the employer's preference and past practice are mitigated by the apparent occasional assignment of the disputed work to employees not represented by Local 1049. The Employer responds that the occasional assignment of driving associated with gas line service work to non-Local 1049 employees has occurred pursuant to the Gas Agreement, which permits the Employer to use non-Local 1049 employees when Local 1049 employees are unavailable to drive. Local 1049 does not dispute this construction of the Gas Agreement. Moreover, Everett Lewis, Local 1049's representative, testified that in approximately January or February 1994, Local 1049 filed grievances resulting from the Employer's assignment of the disputed driving outside the parameters of the Gas Agreement, and that Asplundh agreed to settle those grievances for approximately \$11,000 in back-pay. The record reflects that to the extent that the Employer has deviated from its otherwise consistent practice of assigning the disputed work to employees represented by Local 1049, the deviations have been governed by the collective-bargaining agreement between Asplundh and Local 1049. Thus, we find that the factor of employer preference and past practice favors an

<sup>2</sup>Local 282 argues that sec. 12.03 of the Gas Agreement, which is cited above as explicitly requiring employees represented by Local

1049 to perform the driving associated with the gas utility work covered by the agreement, is irrelevant to a determination of the dispute because it is found under an article of the agreement entitled "Change of Headquarters." We conclude that the location of this language in the Gas Agreement does not detract from its otherwise explicit mandate.

award of the disputed work to employees represented by Local 1049.

### 3. Area and industry practice

Draghi testified that Asplundh as well as its two corporate predecessors have assigned the work in dispute to employees represented by Local 1049. He further testified that LILCO, which performs some of its own gas utility service work, utilizes employees represented by Local 1049 to do the driving associated with such work. Local 1049 Representative Lewis testified that Local 1049 represents employees of other area contractors that perform the driving associated with comparable gas line service work.

Local 282 argues in brief that a local company called Bancker, which also performs gas line service work for LILCO, utilizes employees represented by Local 282 to do the driving associated with such work. In testimony, however, Lawrence Kudla, Local 282's representative, conceded that Bancker does not employ workers represented by Local 1049. Kudla further conceded that Bancker is not comparable to Asplundh because it is just initiating its service of gas lines 2 inches or smaller in diameter and that it does not perform the work on the scale that Asplundh does. Accordingly, an analysis of the area and industry practice favors an award of the work in dispute to employees represented by Local 1049.

### 4. Economy and efficiency of operations

Draghi testified that out of an 8-hour shift, employees represented by Local 1049 spend approximately 1 to 2 hours transporting to and from the jobsite all the workers, tools, material, and equipment necessary to service gas utility lines. Draghi further testified that for the remainder of the shift, the trucks remain idle at the jobsite while the employees represented by Local 1049 service the gas lines. Asplundh asserts that if it were to assign the disputed work to employees represented by Local 282, who are not trained or certified in the service of gas lines and whose labor contract does not permit such work, those employees would remain idle at the jobsite along with the trucks. Under such circumstances, Asplundh asserts that its labor costs would increase significantly because it would have to pay a full day's wages to employees represented by Local 282 and would still have to employ a full crew composed of employees represented by Local 1049 in order to complete the gas utility work.

Local 282 does not dispute that if employees it represents were assigned the disputed driving, employees represented by Local 1049 would still be necessary to

perform the gas line service work and that the Employer's labor costs would significantly increase. Instead, Local 282 asserts that employees it represents could be kept busy transporting materials and debris to and from the jobsite. As noted above, Draghi testified that there is little or no need for the supply of materials to or the removal of debris from gas utility jobsites. Based on the testimony presented, we conclude that this factor favors an award of the work to employees represented by Local 1049.

### 5. Relative skills and training

The testimony of the representatives of all three parties indicates that employees represented by both Unions have commercial driver's licenses and are trained to perform the disputed driving, and therefore meet the minimum criteria for performing such work. As noted above, however, only employees represented by Local 1049 have the requisite training and certification to perform the gas line service work that is central to the driving in question. Thus, this factor favors an award of the work in dispute to employees represented by Local 1049.

### Conclusions

After considering all the relevant factors, we conclude that Asplundh's employees represented by Local 1049 are entitled to perform the work in dispute. We reach this conclusion relying on Asplundh's collective-bargaining agreement with Local 1049, Asplundh's preference and past practice, area and industry practice, economy and efficiency of operations, and the relative skills and training of the employees involved. In making this determination, we are awarding the disputed work to employees represented by Local 1049, International Brotherhood of Electrical Workers, AFL-CIO, not to that Union or to its members. This determination is limited to the controversy that gave rise to this proceeding.

### DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Asplundh Construction Corporation represented by Local 1049, International Brotherhood of Electrical Workers, AFL-CIO are entitled to perform the truck driving related to work on natural gas lines that are 2 inches or less in diameter, to excavation, including asphalt patch work, and to restoration work (pipe trench creation and filling), for the Long Island Lighting Company.